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Issue Date: 09 December 2004

CASE NO.: 2004-LHC-1417

OWCP NO.: 07-147043

IN THE MATTER OF

PRESCOTT KELLER,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC./
AVONDALE INDUSTRIES, INC.,
Employer

APPEARANCES:

William R. Mustian, Esq.
On Behalf of Claimant

Christopher S. Mann, Esq.
On Behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Prescott Keller (Claimant) against Northrop Grumman Ship Systems/Avondale Industries, Inc. (Employer). The formal hearing was conducted in Metairie, Louisiana on September 22, 2004. Each party was represented by counsel, and each presented

documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibit P-1 and Employer's Exhibits 1-3. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on September 19, 1997;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on September 19, 1997;
5. Notices of Controversion were filed December 22, 1997, March 5, 1998 and June 23, 2003;
6. Informal conferences were held on January 23, 2001 and March 18, 2004;
7. The average weekly wage at the time of injury was $483.48;
8. Temporary total disability from January 5, 1998 to June 16, 2003; compensation from June 17, 2003 to present is in dispute;
9. Temporary partial disability is not applicable;
10. Employer has paid total temporary disability benefits from January 5, 1998 to June 16, 2003 at the rate of $322.32 per week.
11. Employer has paid permanent partial disability benefits from June 17, 2003 and continuing at a rate of $165.62 per week based on a wage earning capacity of $236.00 per week;
12. Medical benefits have been paid;
11. Permanent disability and impairment rating are not applicable; and
12. Date of maximum medical improvement is June 30, 2003.

[1] The parties were granted time post hearing to file briefs which was extended up to and through November 23, 2004.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Issue

The unresolved issue in this proceeding is:

1. Nature and extent of disability from June 17, 2003 to the present, specifically, whether employer identified suitable alternative employment as of June 16, 2003.

Statement of the Evidence
Testimonial Evidence

Prescott Keller

Claimant is a 55 year old man who testified that he lives in St. James, Louisiana. He stated he has not worked since being injured while working for Employer in 1997. Claimant described his average day consisting of getting up in the morning, and maybe driving half a mile to a mechanic shop, where he "just sits around a little" for about an hour and a half, and then returns home. Claimant said that the only time he drives any considerable distance is when he has a doctor's appointment, which is forty miles each way. He stated he has trouble with these trips, in the form of his back hurting and his leg "burning," and though he drives as far as he can, he has to pull over and get out of his car and walk around before he can resume driving.

Claimant said that he can sit comfortably for between forty-five minutes and one hour, and then he must get up and walk around. He said that he may be able to sit for a while longer after walking, but then he has to lie down. Claimant testified that he spends "just about the whole day" lying down due to his back and leg pain, and lying down alleviates the pain. Claimant estimated he can walk about a block or a block and a half before his legs feel heavy, his feet drag, and the back of his legs burn. On cross-examination, Claimant stated he has not made any efforts to return to work since his injury.

Rudolph D. Hamsa, M.D.

Dr. Rudolph D. Hamsa testified that he is an orthopedic surgeon who has treated Claimant for some time and in the course of treatment, Claimant has had three back surgeries. His records comprise Claimant's Exhibit P-1 and Employer's Exhibit 2. Dr. Hamsa stated that on June 30, 2003, he placed permanent restrictions on Claimant's ability to work, including no climbing, no stair or ladder

climbing, no bending, stooping or lifting, a carry limit of five to eight pounds, and a walking limit of one to one and a half blocks. Dr. Hamsa stated that Claimant's walking restriction was originally two to two and a half blocks, but because of Claimant's claudication, a condition that may result from spinal stenosis or be vascular in nature and results in poor sitting tolerance and the inability to stand or walk for any sustained length, Claimant's restriction was increased. Dr. Hamsa stated that he did not expect Claimant's restrictions or limitations to significantly change in the future.

Dr. Hamsa opined that Claimant was capable of working four hours per day. He stated that Claimant was currently prescribed sustained release Oxycontin. Dr. Hamsa acknowledged that this class of medications is usually accompanied by the side effect of sedation, but because Claimant was on a low, controlled dose, once every twelve hours, he would not expect sedation to be a problem for Claimant.

Dr. Hamsa discussed the jobs identified in a labor market survey conducted by Ms. Nancy Favaloro, which he stated that he received and reviewed on September 9, 2004. A delivery driver position was identified which would require Claimant to drive a company-owned automatic transmission van and have a form signed when a delivery was made. The position would allow Claimant the ability to alternately sit, stand and walk, and supplies weighed less than ten pounds.[3] Dr. Hamsa stated that he approved of the demands of the position except for the fact Claimant would be required to drive from Gonzales to Lafayette, which he felt was beyond Claimant's sitting ability. He noted that of the two assembler positions identified, one required Claimant to lift fifteen to twenty pounds, which was beyond Claimant's restriction, but was otherwise acceptable. The other assembler position contained a twenty pound lift requirement but was otherwise acceptable.

Regarding an unarmed security guard position, Dr. Hamsa stated that he "wavered" in his acceptance because Claimant would be required to walk thirty minutes out of every ninety minutes he worked. Dr. Hamsa did not believe Claimant was capable of performing this duty because of his claudication problem, but everything else about the job was "perfectly satisfactory." He approved a dispatcher position at a towing company where on the job training would be provided for someone who could perform simple reading. This was a sedentary position which would allow Claimant to alternately stand or walk at will, and lifting was no more than ten pounds. Dr. Hamsa said this position was acceptable,

[3] The detailed descriptions and requirements of the positions identified by the labor market survey are found in Ms. Favaloro's reports which are located at Employer's Exhibit 1 and are discussed further below.

provided Claimant was limited to working four hours per day, but noted that Claimant could work five days per week.

Finally, Dr. Hamsa approved, again subject to the proviso that Claimant was limited to four hours of work per day, a service greeter position. This position provided on the job training and consisted of the employee providing information regarding various services offered in the employer's tire and lubrication department. The worker would mostly stand and walk and could sit during a one hour lunch break and two or three ten-minute breaks during the work day. Lifting did not exceed ten pounds. Dr. Hamsa stated he approved this job because Claimant would be able to alternate standing and walking, would have breaks, and the position adhered to the remainder of Claimant's restrictions.

On cross-examination, Dr. Hamsa agreed that he had originally placed Claimant at maximum medical improvement on April 28, 2003, but explained that the date was "anticipated." He acknowledged that he had placed restrictions on Claimant on April 28, 2003, including no prolonged sitting, standing or walking, no lifting over twenty pounds, and determined that bending and stooping could be performed occasionally. Dr. Hamsa explained that between April and June, when the more severe restrictions were put into effect, Claimant had further complaints, a full workup was performed on Claimant and all of his physicians agreed that he needed further treatment including a CT scan.

Dr. Hamsa stated that the only problem with the delivery driver job was the required driving distance. He said that Claimant had a sitting intolerance and the longest he could sit at one time was half an hour, and then he would need to get out of the car and move around. He agreed that the only problem with the unarmed security guard position was the requirement that Claimant walk thirty out of every ninety minutes. He estimated that Claimant could walk for thirty minutes out of his four hour work day.

Dr. Hamsa said that as of the time of the hearing, he was seeing Claimant for follow-up visits approximately every six months, but that Claimant refilled his prescriptions through Dr. his office on a monthly basis. Finally, Dr. Hamsa stated that in his opinion, Claimant had reached MMI at the time he had placed the current restrictions, on June 30, 2003.

The record which contained the restrictions about which Dr. Hamsa testified was not known to either party until the hearing. Dr. Hamsa could not explain why the note was not furnished to either party, though indicated it may have been due to

confusion regarding at which office the records were stored. This note was made available to the parties and was subsequently entered into evidence as part of Claimant's Exhibit P-1. This is a handwritten notation, dated June 30, 2003, which states Claimant was under stress because the insurance carrier felt he was employable. Dr. Hamsa stated Claimant was unable to sustain sitting or standing, was to perform no climbing, stairs or otherwise, no bending, stooping, or lifting, a carry limit of five to eight pounds, not sustained, and no walking as an "activity requirement" past two or two and one half blocks. Dr. Hamsa stated Claimant was not capable of work activity as of that date.

Other Evidence

Nancy Favaloro, M.S., CRC

Ms. Favaloro is a licensed rehabilitation counselor. Her records comprise Employer's Exhibit 1. Ms. Favaloro issued a vocational rehabilitation report on June 5, 2003 which stated that she had met with Claimant and performed a vocational rehabilitation assessment in 2000, where it was ascertained that Claimant was a high school graduate who could read simple words and add, subtract, and multiply whole numbers (EX 1, p.1). Ms. Favaloro noted that Dr. Hamsa determined that Claimant reached MMI on April 28, 2003 and imposed restrictions of no prolonged sitting, standing or walking, no lifting over 20 pounds, and allowed bending and stooping to be performed occasionally.

Pursuant to the above restrictions, Ms. Favaloro conducted a labor market survey wherein she identified seven potential employment positions for Claimant. The records indicate that descriptions of the positions were sent to Dr. Hamsa for review on September 9, 2004, but there is no indication of his response (EX 1, p.7). These positions and their attendant duties included counter help at a dry cleaners, where on the job training was provided and the duties included taking clothing from customers and operating the register. This position permitted alternate sitting and standing, there were no strenuous tasks involved, and lifting did not exceed ten pounds. Wages were $6.00 per hour. Also identified was a delivery driver position, which paid $5.15 per hour plus $.75 per delivery, and entailed delivering pizza to various local locations, accepting payments from customers and making change if needed. The worker could alternate sitting, standing and walking, may have had to climb a few steps at customers' homes, and lifting was up to fifteen pounds.

An assembly worker position was located which entailed stuffing newspapers and stacking them into bundles. The worker would stand while working, approximately three and a half hours with a thirty minute break between shifts, and some walking was required for this position which paid $4.25 per hour. A booth cashier position provided on the job training to teach the worker to collect tickets from customers, compute time spent in the garage, collect payment, and provide change and receipts when necessary. This was a sedentary position with the ability to alternate postural positions, where the worker would reach with an upper extremity to collect tickets and provide change, and may have to climb down two steps to view a license plate. Wages were $6.15 per hour.

A production technician (assembler) position was identified which entailed the worker recycling, rebuilding, and manufacturing toner cartridges. On the job training was provided to a worker who had manual dexterity and the ability to perform repetitious tasks. The position allowed alternate sitting, standing and walking and stools with backs were provided. Lifting was less than ten pounds for this position which paid $7.50 per hour.

Finally, two unarmed gate guard positions were located. One involved guarding a gate and parking lot for a company that provided security services, where the worker would log personnel and vehicle entry and exit and occasionally patrol the area. The position entailed alternate sitting, standing and walking, and no lifting. Wages started at $5.50 per hour. The other position was located at an oil refinery where the worker would check employees and vehicles at the gate and occasionally patrol the area in a truck. This was mainly a sedentary position with no heavy lifting required. Wages started at $6.75 per hour.

Ms. Favaloro issued a supplemental report on September 13, 2004, wherein she indicated that another labor market survey had been performed. This survey adhered to the same restrictions Dr. Hamsa had imposed on Claimant on April 26, 2003. The updated labor market survey identified six positions within 35 miles of Claimant's home. These jobs included delivery driver, two assembler positions, unarmed security guard, dispatcher, and service greeter.[4]

Finally, following the formal hearing in this matter where Dr. Hamsa's latest restrictions were first made known to the parties, Ms. Favaloro conducted a third labor market survey to identify potential employment which adhered to these new

[4] These are the previously discussed positions about which Dr. Hamsa testified at the hearing.

restrictions.[5] On October 14, 2004, Ms. Favaloro submitted her report, noting that in his testimony, Dr. Hamsa stated that Claimant could work four hours per day lifting less than ten pounds. Ms. Favaloro stated that prior to the hearing, Dr. Hamsa had never indicated that Claimant was limited to working on a part-time basis. She stated that at the hearing, Dr. Hamsa approved most of the jobs she located in the September report but determined that they needed to be part-time in nature.

Pursuant to Dr. Hamsa's restrictions, Ms. Favaloro identified five positions in Claimant's area of residence that were available on a part-time basis. They included the following: greeter at a department store, where Claimant would greet customers as they entered the store as well as provide shopping cars and possibly mark items that are brought into the store. The worker in this position is allowed to alternately sit, stand, and walk, and lifting of ten pounds can be considered. This position paid $5.60 to $6.00 per hour. A delivery driver position would require Claimant to deliver orders to customer's homes or businesses, and he would be taught how to accept payments and make change. When not busy, he can sit to fold boxes. He will have to get in and out of the car to make deliveries and will alternately sit, stand and walk, and a ten pound lifting restriction is acceptable. Pay is $6.00-$7.00 plus tips and mileage.

A shuttle bus driver position was identified at a casino, where Claimant would drive an automatic transmission vehicle to bring customers from parking facilities to the main building. A ten-pound lifting restriction is acceptable. The employer offers an on-call position where Claimant could work four-hour shifts at $9.00 per hour, though he may not work every day. A position for a shuttle driver/cashier at airport parking lots was located, where Claimant would receive on the job training and learn to drive a fifteen passenger van to and from parking lots in the airport terminal. The position is mostly seated and there are four hour shifts available. These drivers do not lift passengers' luggage. Wages are $6.50 per hour. Finally, a position for a bus person at a restaurant was identified, where Claimant would receive on the job training and would clean tables, put plastic plates, cups, bowls and silverware into a tray and carry it to the kitchen. Ms. Favaloro indicated that there are four shifts available and the employer is willing to accommodate any restrictions. The lifting does not exceed ten pounds and Claimant could sit while on breaks and not busy, but otherwise would stand and walk. Wages are $5.50-$5.75 per hour.

[5] The record was left open for thirty days in order for Ms. Favaloro to identify additional potential employment based on these recent restrictions.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc*., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co*., 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.,* 16 BRBS 98 (1984). In this instance, the parties stipulated in Joint Exhibit 1 that an injury/accident occurred on September 19, 1997, during the course and scope of employment. I accept the parties' stipulation. The extent, duration and disabling effects of Claimant's injury, however, are in issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Id. at 60. Any disability before reaching MMI would thus be temporary in nature. In this case, the parties stipulate that Claimant reached

MMI on June 30, 2003. I accept the parties' stipulation and consequently, any compensation awarded after this date will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes, 930 F.2d 424, 430* (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co*., 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident. In the present case, neither party contends that Claimant is capable of returning to his pre-injury employment. As such, he has established a prima facie case of disability and the burden shifts to Employer to establish the availability of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which he is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for the job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs'

requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *Turner*, 661 F.2d at 1042-43; *P&M Crane Co.*, 930 F.2d at 430.

In this case, Employer asserts that it initially established suitable alternative employment through the labor market survey conducted by Ms. Favaloro in June 2003, and further argues that after being apprised of Dr. Hamsa's current restrictions for the first time at the hearing, Ms. Favaloro identified suitable alternative employment on October 14, 2004 which comported with those restrictions. Consequently, Employer contends that it has shouldered its burden and established that Claimant's disability is partial in nature. In opposition, Claimant asserts that Employer has never established suitable alternative employment and he is therefore permanently totally disabled. I disagree and find that Employer has established the availability of suitable alternative employment.

Dr. Hamsa's restrictions in effect at the time of Ms. Favaloro's June 2003 report were no prolonged sitting, standing or walking, no lifting over 20 pounds, and allowed bending and stooping to be performed occasionally. Ms. Favaloro identified seven positions in that labor market survey, all of which complied with Dr. Hamsa's restrictions of which she was aware of at the time. However, because none of the positions were part time, as Dr. Hamsa testified they should be, I am not satisfied that these are the positions upon which Employer can rely to meet its *Turner* burden.

While the restrictions Dr. Hamsa subsequently imposed on June 30, 2003 were not made known until the hearing, nonetheless he approved all but two of the positions later identified in Ms. Favaloro's September 2004 report as adhering to those restrictions, though he explained that Claimant was only capable of working four hours per day. Likewise, all the jobs identified by Ms. Favaloro in her October 14, 2004 report meet with Dr. Hamsa's restrictions and are part time.

Claimant asserts that the jobs identified by Ms. Favaloro on October 14, 2004 do not adhere to Dr. Hamsa's restrictions, specifically because all of the positions require lifting of ten pounds, and Claimant notes that Dr. Hamsa's restrictions included "no bending, stooping, or lifting" and a carry limit of five to eight pounds, not sustained. I do not agree with Claimant's interpretation of Dr.

Hamsa's lifting restriction as rendering the identified jobs unsuitable. Dr. Hamsa testified that the jobs identified in Ms. Favaloro's September 13, 2004 report were acceptable (aside from requiring more than the four hour shifts he deemed appropriate), except for the two assembler positions which exceeded Claimant's restriction because they required him to lift twenty pounds. The positions Dr. Hamsa approved had similar requirements to those identified by Ms. Favaloro's October 2004 report; in fact, most of the positions he approved at the hearing involved some degree of lifting. For example, the description of the delivery driver position stated that the supplies weighed less than ten pounds, but Dr. Hamsa testified that the only problem with the position was that it would require Claimant to be seated too long while driving.

Similarly, the dispatcher position description stated lifting would not exceed ten pounds. Dr. Hamsa testified that this position was acceptable provided Claimant was limited to working four hours per day. Finally, the greeter position, if it could be limited to four hours per day, was also deemed acceptable by Dr. Hamsa because the position adhered to Claimant's restrictions, despite the fact that lifting would not exceed ten pounds. Dr. Hamsa stated, "standing and walking alternatively, he has his breaks, and all that activity, lifting, everything fits. I approved it." (Tr. 14).

At trial Dr. Hamsa reviewed the descriptions of the positions that were contained in Ms. Favaloro's then existing vocational rehabilitation reports, and stated that he made notes in the form of underlining what about the positions did not adhere to his requirements, which he then testified about at the hearing. The only time he mentioned lifting being problematic and exceeding Claimant's restrictions was in the context of the assembler positions which required lifting of fifteen to twenty pounds.

Consequently, because Dr. Hamsa testified that these similar positions were acceptable, I find that suitable alternative employment was identified by Ms. Favaloro's October 14, 2004 report, specifically, the delivery driver and service greeter positions. The delivery driver position identified in October is almost identical to the description of the position identified in September which Dr. Hamsa determined acceptable. In fact, the only problem he noted with the first position, the fact that Claimant would have to drive from Gonzales to Lafayette, is absent from the position identified in October. In addition, the service greeter position approved by Dr. Hamsa is similar to the greeter position identified by Ms. Favaloro in her October report and is part-time..

Claimant is obligated to take employment within his physical restrictions and Employer is responsible for the difference between Claimant's new weekly wage and his former weekly wage. When suitable alternative employment is shown, the wages which the new positions would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp.,* 23 BRBS 327, 330 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director*, OWCP, 937 F.2d 70, 25 BRBS 1(CRT) (2nd Cir 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. National Steel and Shipbuilding*, 10 BRBS 649, 660 (1979). The hourly wages of jobs found to be suitable employment for a claimant may be averaged in order to calculate wage earning capacity, which ensures that the post-injury wage earning capacity reflects each job that is available. *See Avondale Industries v. Pulliam*, 137 F.3d 326 (5th Cir. 1998).

Of the five positions identified in Ms. Favaloro's October 14, 2004 report, the two positions suitable for Claimant's restrictions, greeter and delivery driver, paid $5.60 and $6.00 per hour, respectively. Accordingly, I find Claimant's wage earning capacity to be $5.80 per hour. Using a twenty hour work week estimate, this figure yields a weekly wage of $116.00. Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of Claimant's September 1997 injury. The National Average Weekly Wage (NAWW) for September 199 was $400.53 and the October 2004 NAWW was $523.58. Thus, the 1997 NAWW was approximately 76% of the 2004 NAWW. Based on these adjustments, I find that Claimant has a residual earning capacity of $88.16.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer shall pay to Claimant compensation for temporary total disability benefits from June 17, 2003 until June 30, 2003 (MMI), based on an average weekly wage of $483.48,[6]

[6] There is no issue concerning the compensation paid prior to this time.

(2) Employer shall pay to Claimant compensation for permanent total disability benefits from June 30, 2003 until October 14, 2004, the date suitable alternative employment was identified, based on an average weekly wage of $483.48;

(3) Employer shall pay to Claimant compensation for permanent partial disability benefits from October 14, 2004 and continuing, based on an average weekly wage of $483.48, reduced by Claimant's wage earning capacity of $88.16;

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 9th day of December, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd